Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-811

PHELPS DODGE CORPORATION and related corporations; AMERICAN SMELTING AND REFINING COMPANY (ASARCO, INCORPORATED); DUVAL CORPORATION; CITIES SERVICE COMPANY; and INSPIRATION CONSOLIDATED COPPER COMPANY,

Petitioners,

v.

THE STATE TAX COMMISSION OF ARIZONA; JOHN M. HAZELETT, L. WALDO DEWITT and BOB KENNEDY, COMMISSIONERS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Our only objection to this section of the Petition for Writ of Certiorari is that the provisions of A.R.S. § 43-177 should have been more completely stated

and that A.R.S. § 12-911 should be included. Accordingly, A.R.S. § 43-177(c), (e) and(f) and A.R.S. § 12-911 are set forth in the Appendix at pages 16 and 17.

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment require a state administrative agency to make findings of fact and conclusions of law in respect to a hearing on the assessment of a proposed tax deficiency where the taxpayer's statutory appeal remedy is a trial de novo?

STATEMENT OF THE CASE

The Arizona State Tax Commission proposed to assess deficiency income tax assessments on petitioners herein for the years 1966 through 1968. These deficiency assessments were based on the position that petitioners should

have calculated their Arizona source income for purposes of Arizona state income tax on the separate accounting basis provided for in A.R.S. § 43-135(g) as opposed to the apportionment formula used by all petitioners. Protests to the proposed assessment were filed by each petitioner and oral hearings were duly held in accordance with A.R.S. § 43-177. The Tax Commission decided the protests adversely to the petitioners and thereafter the petitioners appealed to the Arizona Superior Court.

The cases were consolidated in the Superior Court. Motions for summary judgment were then filed by the petitioners. The petitioners moved for summary judgment on the grounds that the Tax Commission decisions were void due to the failure of the Tax Commission to

make written findings of fact and conclusions of law in compliance with the Arizona Administrative Procedure Act, A.R.S. § 41-1011. The State contended that the Administrative Procedure Act which was applicable to the Tax Commission did not generally apply in this case because a special statute, A.R.S. § 43-177 establishing a different procedure for this type of case was applicable under the "Unless otherwise provided by law" phrase of A.R.S. §41-1011. The petitioners' motions for summary judgment were granted and the respondents herein appealed directly to the Arizona Supreme Court.

The Arizona Supreme Court reversed the decision of the lower court and remanded the consolidated action with directions that the Superior Court

proceed to a hearing on a trial de novo. The Arizona Supreme Court held that if there was a conflict between the Administrative Procedure Act and A.R.S. §43-177(f), then the special statute, A.R.S. § 43-177(f) would prevail over the general statute, A.R.S. § 41-1011 of the Administrative Procedure Act. After denial of petitioners' motion for rehearing by the Arizona Supreme Court the petitioners filed this Petition for a Writ of Certiorari.

ARGUMENT

I. Jurisdictional Questions.

A federal question not presented prior to decision by the court of last resort of the state comes too late Ex parte Spies, 123 U.S. 131 (1887). While petitioners acknowledge on page 4 of their Petition for Writ of Certiorari

that the general rule is that a constitutional question first raised on motion for rehearing in a state appellate court comes too late to serve as a basis for review by the Supreme Court of the United States, the petitioners' claim to come within the exception applicable to those cases where the decision supplies a new or unexpected base for a claim of denial of a constitutional right.

Since the respondents did not concede that the Administrative Procedure Act was specifically applicable as petitioners' claimed on page 3 of their Petition, but on the contrary took the position that the Administrative Procedure Act by its own terms excluded its general application to this situation (Appellants' Opening Brief at pages 9 and 10, Appendix, page 19), the petitioners should have anticipated

the possibility that this state question could have been decided adversely to them. If the petitioners intended to preserve their right to argue the constitutional issue, they should have argued that issue below. The decision does not supply a new or unexpected basis for a claim of denial of a constitutional right within the meaning of Great Northern R.R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), where the grounds of the state court decision supplied the defeated party with the new basis for claiming denial of a constitutional right.

The Arizona Supreme Court reversed the Superior Court decision with directions that the Superior Court proceed to a hearing on a trial de novo. Under the provisions of 28 U.S.C. §1257, the United

States Supreme Court may review final judgments of the highest court of the state. The petitioners argue that this is a final judgment on the basis of Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975).

Petitioners do not fall within the Cox Broadcasting exception to the rule of finality. Cox Broadcasting is distinguishable from this case because the reversal of the state court on the federal issue in that case was preclusive of further litigation. In this case reversal of the state court on the federal issue would not be preclusive of further litigation.

If A.R.S. § 43-177 was unconstitutional and the Administrative Procedure Act was generally applicable, then the Judicial Review of Administrative

Decisions Act would also be applicable and superior courts have broad powers under A.R.S. § 12-911 (Appendix, p.16) in such cases. Those powers include the power to "specify questions or matters requiring further hearing or proceedings and give other proper instructions." Courts have remanded cases to administrative agencies for the purpose of making findings of fact and conclusions of law. Trustees of Lexington Realty Trust v. City of Concord, N.H., 336 A.2d 591 (1975); Meadowbrook Country Club v. State Tax Commission of Missouri, 538 S.W.2d 310 (1976). The Missouri statute, Revised Statutes of Missouri 1969 § 536.090 in the Meadowbrook Country Club case, supra, was substantially the same as A.R.S. § 41-1011.

In view of the failure to raise

the federal issue prior to the motion for rehearing in the Arizona Supreme Court and since this is merely an interlocutory proceeding that is not final within the meaning of 28 U.S.C. §1257, the court should deny this petition for a writ of certiorari.

II. Question Presented Has Been Decided Adversely to Petitioners by the United States Supreme Court.

The petitioners have contended that this writ should be granted because the decision of the Arizona Supreme Court violates fundamental notions of fairness and due process. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Matthews v. Eldridge, 424 U.S. 319, 334 (1976). The required degree of procedural safeguards applicable to administrative proceedings varies directly with the

importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances. Frost v. Weinberger, 515 F.2d 57 (1975), cert. denied 424 U.S. 958.

The purpose of findings of fact and conclusions of law is to guarantee that cases will be decided on the basis of the law and the evidence rather than arbitrarily and where review is provided for to facilitate the work for the reviewing tribunal by apprising it of the basis of the decision. Saginaw Broadcasting Company v. Federal Communications Commission, 96 F.2d 554 (1938). In this case findings of fact and conclusions of law by the Tax Commission were not necessary in order to guarantee a proper decision because

A.R.S. § 43-177(c) (See Appendix, p. 17) required the notice of additional assessment to set out the reasons for the proposed additional assessment and a computation thereof and because A.R.S. § 43-177(f) provided for a de novo trial for taxpayers dissatisfied with the Tax Commission's decision.

In the ordinary case where the court reviews the record of an administrative agency, findings of fact and conclusions of law are necessary in order for the court to determine whether or not the decision of the administrative agency was proper. Where the court's function is to try the matter de novo rather than to review the record before the administrative agency, findings of fact and conclusions of law are not necessary to facilitate the work of the court. The

general principles of the above cited cases indicate that due process does not require unnecessary safeguards and in this case findings of fact and conclusions of law by the Tax Commission would have such slight value that they could hardly be considered necessary.

This Court has had occasion to consider what due process requires in the context of a situation where there was further opportunity for a full hearing as in this case. In Goldberg v. Kelly, 397 U.S. 254, 271 (1970), the court concluded that the fundamental requirements of due process in this type of situation did not include formal findings of fact and conclusions of law. There is nothing in the record to indicate that these mining companies need greater procedural safeguards than

welfare indigents did in cases where there was a further opportunity for a full hearing.

Petitioners cited Panama Refining Co. v. Ryan, 293 U.S. 388 (1934); Wichita R.R. & Light Co. v. Public Utilities Comm. of State of Kansas, 260 U.S. 48, 59 (1922); and Mahler v. Zebey, 264 U.S. 332 (1924) in support of their contention that due process requires findings of fact by administrative agencies as a matter of constitutional law. Those cases are distinguishable from this case because there was a failure to make specific findings that were required by specific statutes in those cases. For example, there is no statute in this case comparable to the Kansas statutes which required a finding that rates were unreasonable as a condition precedent to the fixing of new rates.

CONCLUSION

On the basis of the foregoing points and authorities the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney General

/s/
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Assistant Attorney General

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APPENDIX

A.R.S. §12-911. POWERS OF TRIAL COURT.

A. The superior court may:

1. With or without bond, unless required by the statute under authority of which the administrative decision was entered, and before or after answer, stay the decision in whole or in part pending final disposition of the case, after notice to the agency and for good cause shown, except that the court shall not stay an administrative decision wherein unemployment, compensation benefits have been allowed to a claimant pursuant to title 23, chapter 4.
2. Make any order that it deems proper for the amendment, completion or filing of the record of the proceedings of the administrative agency.
3. Allow substitution of parties by reason of marriage, death, bankruptcy, assignment or other cause.
4. Dismiss parties or realign parties plaintiff and defendant.
5. Modify, affirm or reverse the decision in whole or in part.
6. Specify questions or matters requiring further hearing or proceedings and give other proper instructions.
7. When a hearing has been held by the agency, remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it appears that such action is just.
8. In the case of affirmance or partial affirmance of an administrative decision requiring payment of money, enter judgment for the amount justified by the record and for costs, upon which execution may issue.

B. Technical errors in the proceedings before the administrative agency or its failure to observe technical rules of evidence shall not constitute grounds for reversal of the decision, unless it appears to the trial court that the

error or failure affected the rights of a party and resulted in injustice to him.

C. On motion of a party before rendition of judgment, the trial court shall make findings of fact and state conclusions of law upon which its judgment is based.

* * * *

A.R.S. § 43-177. PAYMENTS AND ASSESSMENTS - DEFICIENCY ASSESSMENTS

. . .

(c) NOTICE OF ADDITIONAL ASSESSMENT. If the tax commission determines that the tax disclosed by the original return is less than the tax disclosed by its examination, it shall mail notice or notices to the taxpayer of the deficiency proposed to be assessed.

(1) NOTICE, CONTENTS. Each notice shall set forth the reasons for the proposed additional assessment and the computation thereof.

(2) NOTICE, JOINT RETURNS. In the case of a joint return filed by husband and wife, the notice of deficiency may be a single joint notice, except that if the tax commission is notified by either spouse that separate residences have been established, it shall mail to each spouse, in lieu of the single joint notice, duplicate originals of the joint notice.

. . .

(e) PROTEST, WHEN TO BE FILED. Within ninety days after the mailing of each notice of additional tax proposed to be assessed the taxpayer may file with the tax commission a written protest against the proposed additional tax, specifying in the protest the grounds upon which

it is based. Such written protest shall be prepared and verified in the manner prescribed by the tax commission.

(1) PROPOSED ASSESSMENTS, WHEN FINAL. If no protest is filed, the amount of the deficiency assessed becomes final upon the expiration of the ninety-day period.

(2) PROTEST, ACTION AND HEARING. If a protest is filed, the tax commission shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his protest, shall grant the taxpayer or his authorized representatives an oral hearing. Such hearing shall be held within six months from the date of receipt or written request for such hearing from the taxpayer.

(3) The provisions of this subsection shall be effective for all years beginning on or after January 1, 1970.

(f) APPEAL TO SUPERIOR COURT.

(1) After consideration of the protest and the evidence adduced in the event of such oral hearing, the tax commission's action upon the protest is final upon the expiration of thirty days from the date when it mails notice of its action to the taxpayer, unless within that thirty-day period the taxpayer appeals from the action of the tax commission to the superior court of the county wherein the taxpayer resides or, if the taxpayer does not reside in Arizona, to the superior court of Maricopa County.

(2) The superior court shall hear and determine the appeal as a trial de novo. Within sixty days after the entry of judgment either party

may appeal to the supreme court in the manner provided for appeals from the judgment of a superior court, and such appeal shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as other state cases.

* * * *

APPELLANTS' OPENING BRIEF
(pages 9 and 10)

"ARGUMENT III

A

DOES THE FAILURE TO MAKE DENOMINATED FINDINGS AND CONCLUSIONS RENDER THE RULINGS VOID?

The position of the Commission on this question is, first, that the provisions of A.R.S. § 41-1011 have no application to the rulings complained of here; but, second, that even were the statute applicable, the written record of the action taken by the Commission fully satisfied the requirement for findings and conclusions.

It is clear that the Administrative Procedure Act applied to the Tax Commission as it then existed. The question is therefore this: Did A.R.S. § 41-1011 require that the Commission make specific Findings and Conclusions <u>in these cases</u>? The statute reads:

> <u>Unless otherwise provided by law</u>, any final decision or order adverse to a party in a contested case shall be in writing or stated in the record. Any final decision shall include findings

> of fact and conclusions of law separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings . . . .

The answer is found in the words of the statute, "Unless otherwise provided by law . . . ." It is clear that the assessment provisions of the Income Tax Act, read as a whole, do indeed provide otherwise . . . ."

CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of January, 1978, three copies of the BRIEF OF RESPONDENTS IN OPPOSITION TO [illegible]TION FOR CERTIORARI were mailed postage prepaid to:

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I further certify that all parties required to be served have been served.

BRUCE E. BABBITT
Attorney General

/s/
JAMES D. WINTER

Subscribed and sworn to before me this 3 day of January, 1978.

/s/Leigh Cheatham
Notary Public

My Commission expires:
9-30-81